

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Milwaukee, Wisconsin

WISCONSIN ELECTRIC POWER COMPANY¹

Employer

and

Case 30-RC-6489

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 317, AFL-CIO²**

Petitioner

DECISION AND ORDER³

This is my determination as to the appropriateness of the proposed bargaining unit sought by the Petitioner. The only issue identified on the record is whether distribution control supervisors (dispatchers) are statutory supervisors under the Act. The Petitioner's position is that these employees do not exercise independent judgment sufficient to qualify as statutory supervisors. The Employer contends that dispatchers exercise a sufficient degree of independent judgment in the assignment and direction of field employees' work to be considered supervisors under the Act. I find the Employer's position persuasive. I conclude that dispatchers do exercise independent judgment in regard to both the assignment and direction of field employees' work sufficient to find supervisory status.⁴

¹ The name of the Employer appears as amended at hearing.

² The name of the Union appears as amended at hearing.

³ Upon a petition filed under Section 9(c) of the National Labor Relations Act as amended (Act) a hearing was held before a hearing officer of the National Labor Relations Board (Board). Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

⁴ The Employer and Petitioner filed post-hearing briefs that were carefully considered. The hearing officer's rulings made at the hearing were free from prejudicial error and are affirmed. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

DISCUSSION

The Employer provides electrical and gas energy services in southeastern Wisconsin, including the Milwaukee metropolitan area. The system that distributes this power is monitored from a system control center in Pewaukee, Wisconsin. Approximately 28 dispatchers, the petitioned-for unit, work at the center. Dispatchers staff the system control center at all times, typically six dispatchers work during regular business hours and three during the evening, weekend and overnight shifts.⁵ Dispatchers rotate and work all shifts. The control center consists of a dispatch office, which is divided into desks that are responsible for specific geographic areas, and a write up room. Trouble clerks, clerical employees who assist in dispatching calls to the field, answering phones and completing paperwork, also staff the center. Senior distribution control supervisors (senior dispatchers) supervise dispatchers.⁶ Senior dispatchers report to the manager of Electric Distribution Operations. Distribution Operations is responsible for distribution of electric power through substations, transformers and ultimately to customers.

Prior to 1994 dispatchers were represented by the International Brotherhood of Electrical Workers, Local 2150 (IBEW). In 1994 the Employer and the IBEW entered into an agreement that new dispatcher openings would be management, non-represented vacancies. Current dispatchers had the option of remaining represented by the IBEW or electing to become non-represented employees.⁷ The IBEW currently represents approximately 2900 employees, primarily field employees involved in various aspects of energy delivery. The Petitioner

⁵ A self-selected committee of dispatchers creates a yearly schedule to maintain continual staffing.

⁶ Senior dispatchers are on site during regular business hours, but between 5:00 p.m. and approximately 6:30 a.m. dispatchers are responsible for general management of the control center, such as handling fire alarms, evacuations, security issues.

⁷ One employee dispatcher currently remains represented by the IBEW. Although his responsibilities are similar to that of a Dispatcher his formal title is Distribution Dispatcher, not Distribution Control Supervisor.

currently represents approximately 520 employees. These employees are primarily involved in the operation and maintenance of the Employer's power production plants.

FACTUAL SUMMARY

A dispatcher has three primary functions, (1) monitoring the power distribution system, (2) directing both planned and unplanned switching activities, and (3) assisting field employees in responding to power outages. The first responsibility, monitoring the distribution system, is accomplished by staffing the system control center. The center is connected to an energy management system (EMS), an interactive, computerized system that displays the status of the distribution network. Because system monitoring is a general function dispatchers are only one of many categories of employees that share in this responsibility. The second function, planned and unplanned switching, is specific to dispatchers, however. Planned switching is the trade term for creating a procedure to temporarily reconfigure the distribution system. This allows field employees to power-down part of the system, for maintenance or repair, without interruption of service to customers. Unplanned switching also involves reconfiguring the system, but in response to an event such as a severe weather outage or an outage caused by damage to a transmission line.

A planned switch is triggered when the system control center receives an application from a field employee or crew. When an application is received, a dispatcher in the write up room relies upon their training and knowledge to design a feasible plan to reroute power. In completing this process it is necessary for the dispatcher to use the extensive monitoring equipment in the control center, such as the EMS, but the monitoring equipment does not design the plan. The dispatcher then creates a switching order, the step-by-step instruction used by field employees to accomplish rerouting the system.

Once completed the switching order is moved to the appropriate desk and assigned a calendar date. On the day before the assigned date one of the responsibilities of the dispatcher on the evening shift is to review the switching order to establish the order is correct and remains feasible under current conditions. The overnight dispatcher is also expected to review orders for the following day. If the order is acceptable it is transmitted to field employees to execute. Although the system is designed to maximize peer review a senior dispatcher does not review a switching order at any point in its creation or transmission to the field.

The final responsibility, assisting field employees in responding to power outages, consists of two parts. First, depending on the circumstances of the outage it may be the responsibility of the dispatcher to call in and send field employees to the location of the outage. This aspect will be discussed in detail below in relation to the dispatcher's assignment of work. Second, when a field employee arrives at the location of the outage the employee may be able to resolve the situation without further instruction. However, in circumstances where this is not possible field employees will contact a dispatcher. The dispatcher will assist in analyzing the situation, including directing the field employee to test points in the system. If a switching order is necessary the dispatcher creates an unplanned switching order and transmits the order to the field employees. Dispatchers are available to assist and direct field employees even if a switching order is not ultimately necessary.

Dispatchers direct a variety of employees in their work, both in the field and at the system control center. When a field employee is assigned to complete a switching order the field employee will contact the dispatcher at the appropriate desk for that geographic area, either by telephone or radio. The dispatcher provides the step-by-step instruction and the field employee records the steps in a logbook. The field employee is then required to read the procedure back to

the dispatcher to ensure accuracy.⁸ The field employee then executes the switching order; if the order cannot be executed as designed because of broken equipment or other field conditions the dispatcher will be contacted to revise the switching order. Dispatchers are also responsible for directing the work of trouble clerks in the system control center. When the dispatcher needs to contact field employees, such as to reprioritize a work assignment, the dispatcher may direct the trouble clerk to convey the message to field employees.

A dispatcher also has responsibility for assigning work to field employees in certain circumstances. Under normal operating procedures a work coordinator assigns field employees to a location and assigns work.⁹ However, when the system control center is informed of an outage it is the dispatcher's responsibility to send field employees to the area. Dispatchers will attempt to communicate with work coordinators during normal business hours in an attempt to prevent pulling field employees off critical jobs, but the responsibility is ultimately that of the dispatcher.

Work coordinators are not available after normal weekday hours, however, and dispatchers are responsible for calling in field employees to work in these situations. When an outage is reported after hours the dispatcher has the discretion to determine whether the situation can wait until the following day or whether it is necessary to call in field employees.¹⁰ If it necessary to call in field employees the dispatcher will do so without having to obtain approval from a senior dispatcher or other management official. Dispatchers also have the discretion to hold field employees over beyond the normal end of their shift. A dispatcher also has the

⁸ This exchange is recorded at the Pewaukee center.

⁹ Work coordinator is a work assignment for IBEW unit employees, not a job title. Work coordinators work out of a variety of district offices separate from the centralized system control center.

¹⁰ The decision who to call is primarily determined by a call out list. The list is created under the contract with the IBEW, its primary function is to rank overtime hours, but it also considers factors such as illness or disability that may be relevant to an employee's ability to work overtime. In a life-threatening emergency a field employee who is closer to a problem may possibly be called instead of following the list.

discretion to call in a trouble clerk to cover a shift, or to call in additional trouble clerks if necessary.

ANALYSIS

The plain language of the Act establishes whether an employee is a supervisor. The Act defines supervisors as:

...any individual having authority, in the interest of the Employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgement. 29 U.S.C. §152(11).

This statutory on direction is read in the disjunctive, if any one of the statutory factors is found, regardless of frequency of occurrence, that employee is a statutory supervisor. *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1983). It is also well-established Board law that the party asserting supervisory status has the burden of proving supervisory status. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). The statutory language creates a three part test for determining supervisory status. *Id.* at 713. An employee is a statutory supervisor if the party asserting that status can show: (1) the employee has the authority to engage in one of the twelve listed activities; (2) the exercise of that authority requires the use of independent judgment; and (3) the authority is held in the interest of the employer. *Ibid.* While it is true the Board does not construe supervisory status broadly because employees deemed to be supervisors lose the protection of the Act, this policy consideration will not overcome sufficient evidence under the above test.

The Board has addressed the supervisory status of system operators or dispatchers in the electric utility industry repeatedly. These cases focused primarily on the second part of the test, that these employees do or do not exercise independent judgment in the direction of field

employees. Prior to 1983 the Board consistently held that dispatchers in the electric utility industry were not statutory supervisors. See *Southern Ind. Gas and Elec. Co. v. NLRB*, 657 F.2d 878, 886 (7th Cir. 1981); *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 243 (6th Cir. 1976). As a general proposition, the Board's decisions in these cases were based on the premise that dispatchers requested cooperation from field employees, who had separate field supervisors, and did not direct the work of these employees. *Public Service Co. of Colorado v. NLRB*, 271 F.3d 1213, 1220 n.5 (2001), citing *Arizona Public Serv. Co. v. NLRB*, 453 F.2d 228, 232 (9th Cir. 1971), *NLRB v. Detroit Edison*, supra, *Southern Ind. Gas and Elec. Co.*, supra, *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981). In the face of persistent resistance from the Courts of Appeal, however, the Board reversed its position in *Big Rivers Electric Corp.*, supra. In *Big River* the Board held that creating switching orders and coordinating the after-hours response of field employees constituted responsible direction. As a result dispatchers were held to be supervisors under Section 2(11) of the Act. *Ibid.*

The *Big River* holding was consistently applied until the Board's decision in *Mississippi Power & Light Co.*, 328 NLRB 965 (1999). In *Mississippi Power* the Board overruled *Big River*. In explaining its decision the Board faulted the *Big River* analysis in several respects, noting that the *Big River* analysis inappropriately focused on the complexity of work performed by dispatchers, and failed to appreciate the increasing complexity and rise of "quasi-overseer" in the workplace. *Id.* at 969. The Board held in *Mississippi River* that the judgment used by dispatchers was based on common sense or technical expertise rather than supervisory indicia. In reaching this conclusion the Board explicitly referenced the "legal principles" established in the Board's "charge nurse" decisions. *Id.* at 970. See *Providence Hospital*, 320 NLRB 717, 725 (1996), enf'd. sub. nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir.

1997).

Mississippi Power was decided before the Supreme Court's decision in *Kentucky River*. In *Kentucky River*, supra, the Supreme Court explicitly rejected the Board's interpretation of independent judgment as developed in the "charge nurse" line of cases. *Id.* at 714-17. The Court rejected the Board's position in these cases that employees do not use independent judgment in directing less-skilled employees in delivering services in accordance with employer specified standards. *Ibid.* The Court explicitly held that independent judgment as contemplated by Section 2(11) is a consideration of degree, not the type of work an employee performs. Under the Court's analysis, if an employee performs one of the Section 2(11) functions with a sufficient degree of independent judgment that employee is a statutory supervisor. *Ibid.*

I conclude *Kentucky River*'s impact is not limited to its direct effect of the "charge nurse" line of cases. By invalidating the statutory interpretation involved in these cases, the Court also cast doubt on the continuing viability of those decisions that rely on the same statutory interpretation. *American Commercial Barge Lines Co.*, 337 NLRB No. 168 (2002), supports that conclusion. *American Commercial Barge Line Co.* involved an analysis in the unfair labor practice context of whether docking pilots were statutory supervisors. As with *Mississippi Power* the previous cases addressing docking pilots relied on the statutory interpretation that docking pilots were not supervisors under the Act because their authority to direct employees was based on their greater technical expertise and experience rather than supervisory authority. *Id.* at 3, citing *McAllister Bros. Inc.*, 278 NLRB 601 (1986), *enfd.* 819 F.2d 439 (4th Cir. 1987). The Board held in *American Commercial Barge Line Co.* that the barge pilots were supervisors, explicitly basing its holding on the *Kentucky River* decision. In upholding the Judge's supplemental decision the Board explicitly rejected reliance on pre-*Kentucky River* decisions that

utilize the reasoning of the “charge nurse” cases. *Mississippi Power* is such a case.

The Petitioner argues that *Mississippi Power* remains controlling and that the *Kentucky River* decision does not dictate a finding that dispatchers are supervisors. I disagree.¹¹ The record reflects, and I find, that dispatchers exercise a sufficient degree of independent judgment in assigning and directing work to be considered statutory supervisors. Dispatchers are responsible for all switching activities on the distribution network, requiring dispatchers to prepare and issue orders to field employees. It is clear from the record that dispatchers possess a great deal of discretion in creating switching orders. This is in marked contrast to field employees who receive the orders in the form of step-by-step instructions. Although field employees work with dispatchers in correcting problems in the field the record reflects no disagreement on the point that field employees ultimately follow the directions of dispatchers.

In addition to creating switching orders, dispatchers are also responsible for the correct and proper execution of these orders. This responsibility is reflected in the extensive peer review dispatchers engage in prior to transmitting a switching order to the field. Dispatchers are also expected to be able to provide expert assistance to field employees. Ensuring that adequate field personnel are available, either by holding over or calling out additional field employees, is also a dispatcher responsibility. Although guidelines certainly exist, the dispatcher ultimately retains the discretion to reprioritize the work of field crews whose time represents a significant expenditure by the Employer. Although senior dispatchers supervise dispatchers, it is clear from the record that dispatchers possess a great deal of autonomy in areas ranging from fulfilling their

¹¹ In *Kentucky River* the Court rejected the Board’s conclusion that “ordinary professional or technical judgment in directing less skilled employees to delivery services” is not “independent judgment sufficient to establish supervisory status 523 U.S. at 714. Similarly the parallel analysis in *Mississippi Power* can no longer stand. (no “...supervisory judgment in assigning and directing others, especially *when such assignments and direction flow from professional and technical training* and do not independently affect the terms and conditions of employment of anyone.” 328 NLRB at 970 (emphasis added)).

job duties to scheduling.

The present case is analogous to the situation in *American Commercial Barge Line Co.*. To find that dispatchers are not supervisors, by relying on the *Mississippi Power* decision as the Petitioner suggests, would directly contradict the implicit holding of *American Commercial Barge Line Co.*¹² I conclude that dispatchers do exercise independent judgment in regard to assigning or directing work of field employees sufficient to find supervisory status. Consistent with that determination the petitioned for unit contains no “employees” and the petition must be dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Washington, DC 20570. **This request must be received by the Board in Washington by October 25, 2002.**

Signed at Milwaukee, Wisconsin on this 11th day of October 2002.

Philip E. Bloedorn, Regional Director
National Labor Relations Board
Thirtieth Region
Henry S. Reuss Federal Plaza, Suite 700
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177-8540-4900

¹² Both the Employer and the Petitioner have raised a number of secondary factors both on the record and in brief, including the wage structure, benefit plans, and education requirements of dispatchers and field employees. I do not find it necessary to reach any of these issues in determining the Section 2(11) status of dispatchers.

Wisconsin Electric Power Company
Case 30-RC-6489

Copies of the Decision and Order have been sent on October 11, 2002, by regular mail, to the following parties of record:

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WAIVER

IN THE MATTER OF Wisconsin Electric Power Company 30-RC-6489
(Name of Case) (Number of Case)

PURSUANT TO SECTION 102.67 OF THE RULES AND REGULATIONS OF THE NATIONAL LABOR RELATIONS BOARD, THE UNDERSIGNED PARTY WAIVES ITS RIGHT TO REQUEST REVIEW OF OR FILE EXCEPTIONS TO THE REGIONAL DIRECTOR'S AND/OR HEARING OFFICER'S

DECISION AND ORDER
(Title of Document)

IN THE ABOVE-CAPTIONED MATTER ISSUED ON October 11, 2002
(Date Document Issued)

(Name of Party)

By: _____
(Name and Title of Representative)

DATE: _____